IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al. Plaintiffs, v. TYSON FOODS, INC., et al. Defendants.	)))))))))	Case No. 4:05-cv-00329-GKF-PJC

DEFENDANTS' BRIEF REGARDING
***STATE OF OKLAHOMA'S NOTICE OF FILING OF DOCUMENT* [DKT #2108]**

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Defendants respectfully submit the following brief regarding Plaintiffs' *Notice of Filing of Document*, Dkt. #2108 (hereafter the "Notice").

BACKGROUND

On October 31, 2008, Defendants filed a *Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party or, in the Alternative, Motion for Judgment as a Matter of Law Based on a Lack of Standing*. [DKT #1788 & 1790] (the "Motion to Dismiss"). Plaintiffs filed a response to that motion on December 15, 2008 and Defendants filed a reply on January 5, 2009.

On May 20, 2009, more than five months after briefing was complete, Plaintiffs filed their Notice. The Notice attaches a document that is signed by the Attorney General, but which purports to be an agreement between the Cherokee Nation and the State of Oklahoma (hereafter the "Purported Agreement"). The Notice asserts that the Purported Agreement "relates to issues raised" in Defendants' Motion to Dismiss. Dkt #2108 at 1. However, the Notice does not explain how the Purported Agreement came into being, whether it is legally valid, which issues in this case are allegedly impacted by the Purported Agreement, or how the Purported Agreement affects those issues.

ARGUMENT

I. THE NOTICE CONCEDES THAT DEFENDANTS' MOTION TO DISMISS IS WELL FOUNDED

In their complaint and pleadings in this case, Plaintiffs have repeatedly asserted that the State of Oklahoma is the owner and trustee of the surface waters, groundwater, stream banks, biota and sediments within the portion of the Illinois River Watershed ("IRW") located in Oklahoma. Indeed, the complaint alleges:

> The State of Oklahoma is a sovereign state of the United States. The State of Oklahoma, without limitation, has an interest in the

> beds of navigable rivers to their high water mark, as well as all waters running in definite streams. Additionally, the State of Oklahoma holds all natural resources, including the biota, land, air and waters located within the political boundaries of Oklahoma in trust on behalf of and for the benefit of the public.

Second Amended Complaint, Dkt. #1215, ¶5. Plaintiffs have relied upon the State's supposed sovereign ownership and trusteeship of these natural resources as the basis for their standing to prosecute this lawsuit, as the factual predicate for their trespass and nuisance claims (which require ownership of the injured property as an element of the claim), and as the basis for their alleged damages. *See*, *e.g.*, *State of Oklahoma's Response to [Defendants' Motion] for Partial Judgment as a Matter of Law Based on Plaintiffs' Lack of Standing*, Dkt #1111 at 7-19 (asserting that: (a) the State owns or holds in trust "water running in a definite stream"; (b) "[t]he State owns the beds of navigable streams in Oklahoma", (c) "[t]he State also owns the groundwater where it owns the land above it"; and (d) the State is the sovereign in the IRW and as a result "the State has a legally protected interest in all of the natural resources located in the Oklahoma portion of the Illinois River Watershed" (emphasis in original)).

However, in their Motion to Dismiss, Defendants explained that before Oklahoma became a State, Congress granted all of these natural resources to the sovereign ownership and trusteeship of the Cherokee Nation as compensation for the Cherokee's compelled expulsion from their ancestral lands in the East. *See* Motion to Dismiss at 3-14. This was much more than just an ordinary conveyance of property. Congress granted the Cherokee the natural resource rights of a sovereign nation, limited only by Congress' ability to adjust the rights granted to Indian Tribes by treaty. *Id.* Oklahoma expressly disclaimed any interest in these natural resources as a condition of becoming a State. *Id.* Although subsequent congressional acts have allowed for the sale of many parcels of property within the IRW, no legal change has occurred to the Cherokee Nation's sovereign and exclusive interests over the waters, sediments, and stream

beds of the IRW. *Id.* The federal courts have recently applied these principles in upholding the Nation's continued ownership and trusteeship of the natural resources they were historically granted, such as the streambeds of the IRW. *Id.* at 10-14.

In their response to the Motion to Dismiss, Plaintiffs contested these points and repeated their previous assertions that the State of Oklahoma is the sovereign owner and trustee of the IRW's natural resources. *See*, *e.g.*, *State of Oklahoma's Response in Opposition to Motion to Dismiss*, Dkt #1822, at 2-9 ("the State exercises sovereign authority over the natural resources of the IRW."). However, in the Purported Agreement, Plaintiffs admit that these assertions to the Court were wrong. Rather, Plaintiffs now concede that, as Defendants explained in the Motion to Dismiss, "the Cherokee Nation has substantial interests in the lands, water and other natural resources located within the Illinois River Watershed." Purported Agreement at 1.

As explained in Defendants' Motion to Dismiss, the fact that the Nation possesses substantial interests in the subject matter of this lawsuit triggers the requirement that the Nation be joined under Rule 19 if feasible. *See* Motion to Dismiss at 14-23. Because the Nation is a sovereign with immunity from suit, such joinder can only be accomplished if the Nation voluntarily joins the lawsuit to adjudicate the extent of its legal interests. If the Nation refuses to join the lawsuit and establish the extent of its legal interests in the subject matter of Plaintiffs' claims, the lawsuit must be dismissed. *See id.* at 14-25.

However, the Purported Agreement attempts to avoid a Rule 19 analysis by claiming that the Cherokee Nation has "assigned" the Nation's rights in this case to Plaintiffs. The Purported Agreement also suggests that the Court need not decide whether the Nation or the State is the proper plaintiff because the parties have agreed among themselves that the State has standing.

See Purported Agreement at 1-3. But this attempt to achieve standing by contract is legally invalid and does not change the analysis set out in the Motion to Dismiss.

II. THE PURPORTED AGREEMENT IS INVALID UNDER OKLAHOMA LAW

A. AGREEMENTS BETWEEN THE STATE AND INDIAN TRIBES INVOLVING SURFACE OR GROUND WATERS ARE INVALID UNLESS NEGOTIATED BY THE GOVERNOR OR HIS DESIGNEE, APPROVED BY THE SECRETARY OF THE INTERIOR, AND AUTHORIZED BY A VOTE OF THE LEGISLATURE

Under Oklahoma law, a state official cannot unilaterally contract with an Indian Tribe on behalf of the State. Rather, Oklahoma law mandates specific procedures that must be followed in entering into agreements with Indian Tribes, and requires that certain state and federal officials approve any such agreements. None of those procedures were followed in this case. Accordingly, the document attached to Plaintiffs' Notice is not a valid agreement between the State of Oklahoma and the Cherokee Nation.

74 Okla. Stat. § 1221 expressly sets out the requirements for the State to enter into an Agreement with an Indian Tribe. Section 1221 provides:

> C. 1. The Governor, or named designee, is authorized to negotiate and enter into cooperative agreements on behalf of this state with federally recognized Indian Tribal Governments within this state to address issues of mutual interest. Except as otherwise provided by this subsection, such agreements shall become effective upon approval by the Joint Committee on State-Tribal Relations.
>
> 2. If the cooperative agreements specified and authorized by paragraph 1 of this subsection involve trust responsibilities, approval by the Secretary of the Interior or designee shall be required.
>
> 3. Any cooperative agreement specified and authorized by paragraph 1 of this subsection involving the surface water and/or groundwater resources of this state or which in whole or in part apportions surface and/or groundwater ownership shall become effective only upon the consent of the Oklahoma Legislature authorizing such cooperative agreement

Id. This statute is the exclusive means by which the Attorney General could enter into an agreement with the Cherokee Nation, yet the Purported Agreement does not adhere to several requirements imposed by Section 1221.

1. The Attorney General Exceeded His Authority in Entering into the Purported Agreement

The Attorney General's only potential authority to enter into agreements with Tribal Governments on behalf of the State stems from Section 1221. The Oklahoma state constitution does not grant any state official authority to enter into such agreements. Rather, as the Attorney General has previously noted, the Oklahoma Constitution is silent as to "who in state government shall conduct business and intercourse with Indian tribes" and therefore "such matters are left to the Legislature to determine." 2006 Op. Okla. Att'y Gen. 39, ¶ 17. As the Attorney General has emphasized, "the power of the Governor to contract with Indian tribes is not derived from the Constitution; it is derived from statute[]." 2004 Op. Okla. Att'y Gen. 27, ¶¶ 8-10.

Section 1221 expressly confers this authority upon the *Governor* or his designee. Under the Oklahoma Constitution, the Governor and the Attorney General are distinct executive officers. *See* Okla. Const. art. VI, § 1. Accordingly, when Section 1221 unambiguously vests the Governor with authority to negotiate with Indian Tribal Governments, it bestows no power upon the Attorney General or other unnamed officials in the State's Executive Branch. The Legislature clearly knew how to confer the power to enter into agreements and would have granted that power to the Attorney General had it wished to do so. Therefore, Section 1221's express provision for the Governor's power to enter agreements, coupled with the absence of any mention of the Attorney General, creates a negative inference regarding the Attorney General's authority.

This is consistent with other Oklahoma statutes conferring authority to specific entities to enter into agreements with Tribes for certain purposes. *See, e.g.*, 19 Okla. Stat. § 339(A)(17) (2008) (granting county commissioners the authority to enter into non-Section 1221 agreements for road improvements); 74 Okla. Stat. § 840-7.1 (2008) (permitting state agencies to lease employee services to Tribes that have purchased real property from the state). Indeed, a recent formal opinion of the Oklahoma Attorney General demonstrates that this analysis is correct. In that opinion, the Attorney General noted that various statutes confer upon specific state agencies the power to negotiate specified contracts, but that the Legislature has enacted no statute conferring a similar power on the Oklahoma Boxing Commission. The Attorney General's formal opinion thus concluded that any agreement between the Boxing Commission and Tribes "must be negotiated and entered into" by the Governor or designee pursuant to Section 1221. 2006 Op. Okla. Att'y Gen. at ¶¶ 18-19. The Purported Agreement between the Attorney General and the Cherokee cannot be reconciled with this analysis.

In sum, Oklahoma law authorizes "[t]he Governor, or named designee" to negotiate and enter into agreements with recognized Indian Tribal Governments. 74 Okla. Stat. § 1221(C)(1). Yet the Purported Agreement fails to satisfy this express requirement. The Purported Agreement recognizes that the parties signing the agreement must have valid authority. *See* Purported Agreement at p. 1 and ¶¶ 5, 7. But since the Governor is not a signatory to the Purported Agreement and did not designate the Attorney General to negotiate and execute that document pursuant to Section 1221, the Attorney General acted *ultra vires* in attempting to create a agreement between the State and the Cherokee Nation. The Purported Agreement is therefore invalid.

2. The Purported Agreement Lacks the Required Approval of the Secretary of the Interior

The Purported Agreement fails to satisfy additional requirements under Section 1221. When an agreement between the State and an Indian Tribe "involve[s] trust responsibilities," it is not valid unless and until it is approved by the Secretary of the Interior or his designee. 74 Okla. Stat. § 1221(C)(2). The Purported Agreement plainly involves the State and Cherokee Nation's competing claims to be the sovereign that holds the natural resources of the IRW in trust. Indeed, the Purported Agreement acknowledges that its topic is the ownership and trusteeship "of the lands, water and other natural resources" of the IRW. Purported Agreement at p. 1.

The fact that the Purported Agreement involves resources held in trust would be apparent even without this explicit acknowledgement. The IRW indisputably contains lands which are held in trust or restricted status[1] for the benefit of the Nation. *See* Felix Cohen, *Handbook of Federal Indian Law* § 15.03 & n.14 (2005 ed.). Moreover, trust responsibilities apply to all submerged lands and riverbeds in Indian county. *See Choctaw Nation v. Oklahoma*, 397 U.S. 620, 633-36 (1970). With respect to water, the creation of a reservation "impliedly reserves water rights to the tribe or tribes occupying the territory" to "carry out the purposes for which the lands were set aside." These waters are held in trust by the tribe or the United States for the benefit of the tribal members. Cohen, *supra*, at § 19.03[1] (citing *Winters v. United States*, 207 U.S. 564, 576-77 (1908)). This reservation of water rights includes both surface water and groundwater. Judith V. Royster, *Indian Tribal Rights to Groundwater*, 15 Kan. J.L. & Pub. Pol'y 489, 490 (2006).

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[1] Trust or restricted land need not be on a formal reservation to be held in trust as a part of Indian country. *See Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993). Rather, the Department of the Interior treats lands held in trust or restricted status "identically for virtually all purposes." Felix Cohen, *Handbook of Federal Indian Law* § 16.03[1] (2005 ed.).

Although the Purported Agreement involves trust responsibilities, it has not been approved by the Secretary of the Interior. There is no indication that Plaintiffs have even submitted the document to the Secretary for his approval. Accordingly, the Purported Agreement is not valid under Section 1221.

3. The Purported Agreement Lacks the Required Approval of the Legislature

Similarly, the Purported Agreement fails to comply with the requirement that an agreement "involving the surface water and/or groundwater resources of" the State or which "apportions surface and/or groundwater ownership" must obtain the approval of the Legislature. 74 Okla. Stat. § 1221(C)(3). The Purported Agreement triggers the legislative approval requirement because the alleged pollution claim assigned to the Attorney General "involves" both surface water and groundwater resources in the IRW. The disjunctive wording of the statute makes clear that legislative approval is required even when an agreement does not "apportion" water rights. Thus even though the Purported Agreement disclaims any determination of rights or interests to water resources in the IRW, *see* Purported Agreement at ¶ 4, it nonetheless involves water resources. Accordingly, since the Purported Agreement has not obtained the Legislature's approval it is invalid.

4. Agreements Pursuant to Section 1221 May Not be Given Retroactive Effect

Even if the Purported Agreement were valid—and it is not—agreements under Section 1221 may not be retroactively effective. The Purported Agreement, signed on May 19, 2009, attempts to make its effective date retroactive to June 13, 2005. *See* Purported Agreement at ¶ 8. The Purported Agreement, however, cites no authority permitting it to be retroactive. Section 1221 expressly denies such authority. Section 1221 states that agreements between the State and Indian Tribes "shall become effective upon approval" of the Joint Committee on State-Tribal

Relations, "[e]xcept as otherwise provided by this subsection." 74 Okla. Stat. § 1221(C)(1). The sole exception is for agreements involving water resources, which "shall become effective only upon the consent of the Oklahoma Legislature." 74 Okla. Stat. § 1221(C)(1), (3). The statute thus expressly disclaims any other exceptions to the default date of effectiveness.

Since neither the statutory default date for effectiveness nor its sole exception permit retroactively effective agreements, the Purported Agreement cannot be valid prior to the date it is approved by the Legislature, an event that has not occurred.

B. OKLAHOMA LAW FORBIDS THE ASSIGNMENT OF PLAINTIFFS' CLAIMS

Oklahoma law forbids the assignment of claims sounding in tort. 12 Okla. Stat. § 2017(D) (2009). This is the general common law rule, which Oklahoma's Supreme Court adopted shortly after Oklahoma became a state. *Dippel v. Hunt,* 517 P.2d 444, 446 (Okla. Civ. App. 1973) (citing *Kansas City M. & O. Ry. Co. v. Shutt*, 104 P. 51 (Okla. 1909)). In modern times, Oklahoma has codified this prohibition in 12 Okla. Stat. § 2017(D), which states "[t]he assignment of claims not arising out of contract is prohibited. However nothing in this section shall be construed to affect the law in this state as relates to the transfer of claims through subrogation."[2] Prior to the enactment of Section 2017(D), the rule against assignment of claims

[2] The exceptions stated in Section 2017(D) are not applicable here, as Plaintiffs' claims do sounds in contract and the Purported Agreement is not an agreement for subrogation. Subrogation is defined as "[t]he substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities, Black's Law Dictionary at 1427 (6th ed. 1990), and is divided into equitable and conventional subrogation. *Jorski Mill & Elevator Co. v. Farmers Elevator Mut. Ins. Co*., 404 F.2d 143, 146 (10th Cir.1968). Both equitable and conventional subrogation require the payment of a debt on behalf of a second party in order for the payor to succeed to the rights of the second party in relation to the debt. In particular, equitable subrogation addresses an "instance where one person who is not a mere volunteer, *pays a debt for which another is primarily answerable* …." *United Golf, LLC v. Westlake Chem. Corp.*, 2006 U.S. Dist. LEXIS 57531, *5 (N.D. Okla. Aug. 15, 2006) (citing

was incorporated in 12 Okla. Stat. § 221 (repealed 1984), which stated that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided in this article but this section shall *not be deemed to authorize the assignment of a thing in action, not arising out of contract*." *Id.* (emphasis added).

Oklahoma courts have consistently applied this prohibition, both historically and more recently. *See*, *e.g.*, *Rose Group, L.L.C. v. Miller*, 64 P.3d 573, 575 (Okla. Civ. App. 2003) ("Section 2017(D) prohibits the assignment of claims not arising from contract. This section embodies the common law rule that a chose in action arising out of a pure tort is not assignable.") (citing *Kansas City*, 104 P. at 53); *Aetna Cas. & Sur. Co. v. Associates Transports*, 512 P.2d 137, 140 (Okla. 1973) ("We have held the emphasized portion of § 221 prohibits assignment of a cause of action arising out of a pure tort.").

The Purported Agreement expressly states that it seeks to assign tort claims. *See* Purported Agreement at ¶1 ("The Cherokee Nation …assigns to the State of Oklahoma any and all claims it has or may have against Defendants … for their alleged pollution of the lands, water and other natural resources of the Illinois River Watershed resulting from poultry waste."). Because such an assignment is prohibited by Oklahoma law, the Purported Agreement is invalid.

United States Fid. and Guar. Co. v. Federated Rural Elec. Ins. Corp., 37 P.3d 828, 831 (Okla. 2001) (emphasis added)). Conventional subrogation is "a doctrine the law has devised for the benefit of *one secondarily liable who has paid the debt of another*." *Sexton v. Cont'l Cas. Co.*, 816 P.2d 1135, 1138 (Okla. 1991) (emphasis added). Neither the Purported Agreement nor Plaintiffs' Second Amended Complaint contains any indication that the State of Oklahoma has paid a debt belonging to the Cherokee Nation. Additionally, Plaintiffs cannot characterize the assignment in the Purported Agreement as conventional subrogation because the disputed transfer of rights in the Purported Agreement occurred after the cause of action arose. To be enforceable, in the case of a claim sounding in tort, an agreement setting forth subrogation rights must exist prior to the creation of the cause of action. *See Associates Transports*, 512 P.2d at 140.

III. EVEN IF IT WERE VALID, THE PURPORTED AGREEMENT IS INSUFFICIENT TO CURE PLAINTIFFS' STANDING DEFECTS

In light of its numerous deficiencies, the Purported Agreement is insufficient as a matter of law to alter the rights of Plaintiffs or the Cherokee Nation. However, even if the Purported Agreement were valid between its parties, this last-minute, retroactive arrangement is insufficient to cure the standing defect noted in Defendants' Motion to Dismiss. The "irreducible constitutional minimum of standing" is an "indispensable part of the plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 569 n.4 (1992). Thus, Plaintiffs may not simply agree with the Cherokee Nation to overlook their standing deficiencies, nor may they stipulate their standing to this Court. Moreover, "standing is to be determined as of the commencement of the suit," based upon "the facts existing when the complaint is filed." *Lujan*, 504 U.S. at 569 n.4, 570 n.5. Thus, Plaintiffs may not *retroactively* cure standing defects that existed at the time litigation commenced. For both of these reasons, the Purported Agreement does not change the standing inquiry discussed in the Motion to Dismiss.

A. NO PARTY MAY STIPULATE OR CONSENT TO STANDING

The Purported Agreement states that the parties and the Court need not take the "time and expense" to resolve the precise nature of each sovereign's interest" in the IRW because Plaintiffs and the Cherokee Nation have agreed among themselves that Plaintiffs have "sufficient interests in the lands, water and other natural resources of the [IRW] to prosecute claims" raised in this suit. Purported Agreement at 1, cl. 6, 8. This is not how the doctrine of federal standing works. Plaintiffs may not bypass existing standing defects merely by agreeing to overlook those defects, as they seek to do with the Purported Agreement. *See* Purported Agreement, at 1, cls. 7-8. The federal courts "have always insisted on strict compliance with th[e] jurisdictional standing requirement." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). Indeed, standing is an "indispensable

part of the plaintiff's case." *Lujan*, 504 U.S. at 561. Because "standing is an Article III requirement for jurisdiction, the parties do not have the power to confer such jurisdiction upon the Court by conceding the standing of certain plaintiffs." *Barhold v. Rodriguez*, 863 F.2d 233, 234 (2d Cir. 1988); *see Golden v. Government of the Virgin Islands*, 47 Fed. App'x 620, 622 (3d Cir. 2002); *Wilson v. Glenwood Intermountain Props.*, 98 F.3d 590, 593 (10th Cir. 1996). Not even an agreement between Plaintiffs *and Defendants* as to Plaintiffs' ability to sue could confer standing in this Court, *see Wilson*, 98 F.3d at 593, much less one between Plaintiffs and a third party. Indeed, "the consent of the parties [to subject matter jurisdiction] is irrelevant." *Ins. Corp. of Ir. Ltd. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982). Plaintiffs and the Cherokee Nation simply have no authority to "agree" that Plaintiffs have "sufficient interests in the lands, water and other natural resources of the [IRW] to prosecute claims" raised in this suit. Purported Agreement at 1, cl. 6; *see Wilson*, 98 F.3d at 593 ("[P]arties cannot confer subject matter jurisdiction on the courts by agreement."). Plaintiffs and the Cherokee Nation may not take it upon themselves to relieve this Court of its duty to "resolve the precise nature of each sovereign's interest" in the IRW, merely to avoid the "time and expense" associated with evaluating standing. Purported Agreement at 1, cl. 8; *see Richardson v. Ramirez*, 418 U.S. 24, 36 (1974) (stating that "purely practical considerations" cannot control the scope of federal subject matter jurisdiction); *Denver v. Matsch*, 635 F.2d 804, 808 (10th Cir. 1980) (same). Jurisdictionally, it is simply of no consequence whether the Cherokee Nation now finds it unobjectionable for Plaintiffs to bring this suit. *See Ins. Corp of Ir.*, 456 U.S. at 702. Nor may the Plaintiffs and the Cherokee Nation agree that this Court need not decide which of them has standing simply because one of them does. *Id.* Thus, despite its aspirations, the Purported Agreement does not alter the standing inquiry raised in Defendants' Motion to Dismiss. For the

reasons discussed in Defendant's Motion, Plaintiffs continue to bear the burden of proving that they have standing to assert their claims. This they cannot do. As Defendants' Motion to Dismiss explains and the Purported Agreement recognizes, the Cherokee Nation is both the owner and sovereign trustee over the natural resources of the IRW.

B. PLAINTIFFS MAY NOT RETROACTIVELY ESTABLISH STANDING

Because the Purported Agreement admits that the Cherokee Nation has—at a minimum—"substantial interests" in the natural resources of the IRW, the agreement attempts to cure Plaintiffs' standing problem by making the Purported Agreement retroactive to the time this lawsuit was commenced. *See* Purported Agreement at ¶8. As noted above, this attempt conflicts with governing Oklahoma law on when agreements with Indian Tribes become effective. However, even if Oklahoma law allowed retroactive agreements with Indian Tribes, the Purported Agreement would not the standing problem created by the Cherokee Nation's interests in the IRW. Just as Plaintiffs may not stipulate their standing to this Court, they may not seek to retroactively repair standing that was deficient at the time their Complaint was filed. "[S]tanding is to be determined as of the commencement of the suit." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992). The personal interest required for a justiciable cause "must exist at the commencement of litigation." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs (TOC), Inc.*, 528 U.S. 167, 190 (2000). A plaintiff may not "create" standing—and thus federal jurisdiction—out of facts that arise after the inception of a lawsuit. *See Lujan*, 504 U.S. at 569, n.4. Moreover, a plaintiff may not cure standing defects through a written agreement, executed after commencement of the lawsuit, simply because that agreement applies retroactively. *See Messagephone, Inc. v. SVI Systems, Inc.*, 2000 U.S. App. LEXIS 19976, at *13 (Fed Cir. 2000) ("[A] *nunc pro tunc* assignment executed after filing of a lawsuit cannot retroactively cure standing that was deficient at the time of filing."); *Enzo APA & Son, Inc. v. Geapag A.G.*, 134

F.3d 1090, 1092-93 (Fed. Cir. 1998). For example, courts routinely refuse to confer standing based upon written agreements that retroactively assign patent rights to the plaintiff. *See, e.g.*, *Messagephone* at *11-15; *Enzo*, 134 F.3d at 1092-93; *Gaia Techs., Inc. v. Reconversion Techs., Inc.* 93 F.3d 774, 779-80 (Fed. Cir. 1996); *Merial Ltd. v. Intervet, Inc.*, 430 F. Supp. 2d 1357, 1362 (N.D. Ga. 2006). Such post-hoc assignments fail to remedy the fact that *when the complaint was filed*, no valid transfer of rights had occurred. *See Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F.3d 1304, 1309-10 (Fed. Cir. 2003); *Enzo*, 134 F.3d at 1093. Like these cases, Plaintiffs plainly seek to use the Purported Agreement to circumvent the fact that at the commencement of the lawsuit, no assignment of the Cherokee Nation' rights had been made (if such an assignment of rights were legally possible). *See* Purported Agreement at ¶8. Even an assignment of merely the Cherokee Nation's right to *sue* based upon its property interests in the IRW may not retroactively establish standing. *See Berger v. Weinstein*, 2008 U.S. Dist. LEXIS 59948, at *19-20, n.4 (E.D. Pa. August 6, 2008) (refusing to confer standing based upon retroactive assignment of borrowers' rights to sue a property developer to the plaintiff creditor); *Hill v. Martinez*, 87 F. Supp. 2d 1115, 1121 (D. Colo. 2000) ("Plaintiffs' appointments as representatives [after the complaint was filed] could not retroactively confer standing upon them.") (citation omitted). Thus, whether or not the Purported Agreement is deemed valid between its parties, this eleventh-hour arrangement may not retroactively repair the standing defect noted in Defendants' Motion to Dismiss. Accordingly, for the reasons discussed in Defendant's Motion, Defendants respectfully request that this Court dismiss Plaintiffs' complaint for want of subject matter jurisdiction. *Tuck v. United Servs. Auto. Ass'n*, 859 F.2d 842, 844 (10th Cir. 1988) ("'A court lacking jurisdiction . . . must dismiss the cause at any stage of the

proceedings in which it becomes apparent that jurisdiction is lacking.'" (quoting *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974))).

IV. THE IDENTITY OF THE PROPER PLAINTIFF IS ESSENTIAL TO DECIDING PLAINTIFFS' CLAIMS

The federal rule that each Plaintiff demonstrate their own standing is grounded in practical reality as well as the limited power of the federal courts. Simply put, Plaintiffs' claims cannot be decided without knowing the identity of the proper plaintiff. It is insufficient for Plaintiffs and the Cherokee Nation to say that the Court need not decide which of them owns the properties and resources at issue. *See* Purported Agreement at 1. For example, to prove the elements of their trespass claim, Plaintiffs must demonstrate: (i) a possessory property interest in the property;[3] (ii) "actual and exclusive possession" of the property;[4] and (iii) an invasion without legal authorization or the consent of the person lawfully entitled to possession.[5] Similarly, Plaintiffs' private nuisance claim requires that the State of Oklahoma maintains a possessory property interest in the property and demonstrate interference with its "private use and enjoyment" of the same. See Dkt. No. 2033 at 9-14; Dkt. No. 2231 at 2-4. None of these elements can be established if the owner and/or trustee of the property is undetermined. In sum, it is insufficient for two potential plaintiffs to simply agree that the Court should ignore the question of which party owns the property in question.

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[3] *See* Dkt. No. 2055 at 8-10; June 15, 2007 Hearing Tr. at 176:11-22 (Dkt. No. 2055 Ex. 1).

[4] Dkt. No. 2055 at 10-11 n.4; *see*, *e.g.*, *New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1235 (D. N.M. 2004), *aff'd by* 467 F.3d 1223, 1248 n.36 (10th Cir. 2006).

[5] *See* Dkt. No. 2055 at 14-15, 14 n.8; *see*, *e.g.*, *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001) (*en banc*).

V. UNDER RULE 19, THE CHEROKEE NATION IS AN INDISPENSABLE PARTY TO THE INTERPRETATION OF THE PURPORTED AGREEMENT

Finally, the federal courts have repeatedly held that the parties to a contract are necessary and indispensable when the validity of that contract is an issue before the Court. *See Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987); *Dawavendewa v. Salt River Project Agric.*, 276 F.3d 1150, 1156-57 (9th Cir. 2002); *McClendon v. U.S.*, 885 F.2d 627, 633 (9th Cir. 1989) ("Because the Tribe is a party to the lease agreement sought to be enforced, it is an indispensable party under [Rule] 19"); *Enterprise Management Consultants, Inc. v. U.S.*, 883 F.2d 890, 893-94 (10th Cir. 1989); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325-26 (9th Cir. 1975). Accordingly, the federal courts have repeatedly held an Indian Tribe is an essential party to litigation that seeks to interpret a contract affecting the Tribe's interests. *Jicarilla*, 821 F.2d at 540; *Dawavendewa*, 276 F.3d at 1156-57; *McClendon*, 885 F.2d at 633; *Enterprise Management.*, 883 F.2d at 893-94; *Lomayaktewa*, 520 F.2d at 1325-26.

In light of the authorities cited in this brief, the issues of: (1) whether the Purported Agreement is valid; and (2) what (if any) effect it has on the rights of the Cherokee Nation, the State, and Defendants are squarely before this Court. Those issues cannot be decided in the absence of the Cherokee Nation. As the Tenth Circuit has stated, "no procedural principle is more deeply imbedded in the common law" than the rule that, in a case challenging the validity of a contract, all parties to the contract, as well as all parties "who may be affected by the determination of the action are indispensable." *Jicarilla Apache Tribe*, 821 F.2d at 540 (quoting *Lomayaktewa*, 520 F.2d at 1325). Thus, the addition of the Purported Agreement to this case makes the Cherokee Nation more indispensable, not less.

CONCLUSION

The Purported Agreement recognizes that, despite its terms, it may be necessary for the

Court to decide the merits of Defendants' Motion to Dismiss. *See* Purported Agreement ¶¶ 4, 9, 10 (reserving the Nation's sovereign immunity for Rule 19 and stating that the Purported Agreement's provisions are invalid if the ownership of natural resources remains before the Court). For the foregoing reasons, such a decision on the merits cannot be avoided. Accordingly, Defendants respectfully request that Court grant the Motion.

Respectfully submitted,

BY: *____/s/ Jay T. Jorgensen*_____

Thomas C. Green
Mark D. Hopson
Jay T. Jorgensen
Gordon D. Todd
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

-and-

Robert W. George
Vice President & Associate General Counsel
Bryan Burns
Timothy T. Jones
Tyson Foods, Inc.
2210 West Oaklawn Drive
Springdale, Ark. 72764
Telephone: (479) 290-4076
Facsimile: (479) 290-7967

-and-

Michael R. Bond
KUTAK ROCK LLP
Suite 400
234 East Millsap Road
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

-and-

Patrick M. Ryan, OBA # 7864

Stephen L. Jantzen, OBA # 16247
RYAN, WHALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766

ATTORNEYS FOR TYSON FOODS, INC.; TYSON POULTRY, INC.; TYSON CHICKEN, INC; AND COBB-VANTRESS, INC.

BY: /s/*James M. Graves*
(SIGNED BY FILING ATTORNEY WITH PERMISSION)

Woodson W. Bassett III
Gary V. Weeks
James M. Graves
K.C. Dupps Tucker
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
Telephone: (479) 521-9996
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753
George W. Owens
OWENS LAW FIRM, P.C.
234 W. 13th Street
Tulsa, OK 74119
Telephone: (918) 587-0021
Facsimile: (918) 587-6111

ATTORNEYS FOR GEORGE'S, INC. AND GEORGE'S FARMS, INC.

BY: */s/ A. Scott McDaniel*
(SIGNED BY FILING ATTORNEY WITH PERMISSION)

A. Scott McDaniel, OBA #16460
Nicole M. Longwell, OBA #18771
Philip D. Hixon, OBA #19121
MCDANIEL, HIXON, LONGWELL

& ACORD, PLLC
320 South Boston Ave., Ste. 700
Tulsa, OK 74103
Telephone: (918) 382-9200
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
Telephone: (501) 688-8800
Facsimile: (501) 688-8807

ATTORNEYS FOR PETERSON FARMS, INC.

BY: */s/ John R. Elrod*
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
John R. Elrod
Vicki Bronson, OBA #20574
P. Joshua Wisley
CONNER & WINTERS, L.L.P.
211 East Dickson Street
Fayetteville, AR 72701
Telephone: (479) 582-5711
Facsimile: (479) 587-1426

-and-

Bruce W. Freeman
D. Richard Funk
CONNER & WINTERS, L.L.P.
4000 One Williams Center
Tulsa, OK 74172
Telephone: (918) 586-5711
Facsimile: (918) 586-8553

ATTORNEYS FOR SIMMONS FOODS, INC.

BY: */s/ Robert P. Redemann*
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
Robert P. Redemann, OBA #7454
PERRINE, MCGIVERN, REDEMANN,

REID, BERRY & TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
Telephone: (918) 382-1400
Facsimile: (918) 382-1499

-and-

Robert E. Sanders
Stephen Williams
YOUNG WILLIAMS P.A.
Post Office Box 23059
Jackson, MS 39225-3059
Telephone: (601) 948-6100
Facsimile: (601) 355-6136

ATTORNEYS FOR CAL-MAINE FARMS, INC. AND CAL-MAINE FOODS, INC.

BY: *__/s/ John H. Tucker__*

(SIGNED BY FILING ATTORNEY WITH PERMISSION)
John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
RHODES, HIERONYMUS, JONES, TUCKER & GABLE, PLLC
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: (918) 582-1173
Facsimile: (918) 592-3390

-and-

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 766-7000
Facsimile: (612) 766-1600

ATTORNEYS FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLP

CERTIFICATE OF SERVICE

I certify that on the 18th day of June 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General — drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General — kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General — trevor_hammons@oag.state.ok.us
Daniel P. Lennington, Assistant Attorney General — daniel.lennington@oag.ok.gov

Douglas Allen Wilson — doug_wilson@riggsabney.com
Melvin David Riggs — driggs@riggsabney.com
Richard T. Garren — rgarren@riggsabney.com
Sharon K. Weaver — sweaver@riggsabney.com
Robert Allen Nance — rnance@riggsabney.com
Dorothy Sharon Gentry — sgentry@riggsabney.com
Joseph P. Lennart — jlennart@riggsabney.com
David P. Page — dpage@riggsabney.com
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS

Louis W. Bullock — lbullock@bullock-blakemore.com
Robert M. Blakemore — bblakemore@bullock-blakemore.com
BULLOCK BULLOCK & BLAKEMORE, PLLC

Frederick C. Baker — fbaker@motleyrice.com
Lee M. Heath — lheath@motleyrice.com
William H. Narwold — bnarwold@motleyrice.com
Elizabeth C. Ward — lward@motleyrice.com
Elizabeth Claire Xidis — cxidis@motleyrice.com
Ingrid L. Moll — imoll@motleyrice.com
Jonathan D. Orent — jorent@motleyrice.com
Michael G. Rousseau — mrousseau@motleyrice.com
Fidelma L. Fitzpatrick — ffitzpatrick@motleyrice.com
MOTLEY RICE, LLC
COUNSEL FOR PLAINTIFFS

A. Scott McDaniel — smcdaniel@mhla-law.com
Nicole Longwell — nlongwell@mhla-law.com
Philip D. Hixon — phixon@mhla-law.com
Craig A. Mirkes — cmirkes@mhla-law.com
MCDANIEL HIXON LONGWELL & ACORD, PLLC

Sherry P. Bartley — sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC

COUNSEL FOR PETERSON FARMS, INC.

R. Thomas Lay rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES

David G. Brown dbrown@lathropgage.com
Jennifer S. Griffin jgriffin@lathropgage.com
LATHROP & GAGE, L.C.

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann rredemann@pmrlaw.net
David C. Senger dsenger@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BERRY & TAYLOR, PLLC

Robert E. Sanders rsanders@youngwilliams.com
E. Stephen Williams steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
THE OWENS LAW FIRM, P.C.

James M. Graves jgraves@bassettlawfirm.com
Gary V. Weeks gweeks@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
K.C. Dupps Tucker kctucker@bassettlawfirm.com
BASSETT LAW FIRM

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
Bruce W. Freeman bfreeman@cwlaw.com
D. Richard Funk dfunk@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
CONNER & WINTERS, PLLC

COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker jtucker@rhodesokla.com
Colin H. Tucker chtucker@rhodesokla.com
Theresa Noble Hill thill@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

Terry W. West terry@thewestlawfirm.com
THE WEST LAW FIRM

Delmar R. Ehrich dehrich@faegre.com
Bruce Jones bjones@faegre.com
Krisann C. Kleibacker Lee kklee@faegre.com
Todd P. Walker twalker@faegre.com
Melissa C. Collins mcollins@faegre.com
FAEGRE & BENSON LLP

COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

/s/ *Jay T. Jorgensen*
Jay T. Jorgensen